ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
FURTHER NOTICE OF PROPOSED RULEMAKING Exclusive Marketing and Bulk Agreements for	)	MB Docket No. 07-51
Provision of Video Services in Multiple Dwelling	)	
Units and Other Real Estate Developments	)	

COMMENTS OF REALTYCOM PARTNERS

DONALD A. CLARK, CEO
REALTYCOM PARTNERS, LLC
P.O. BOX 871
MOORESTOWN, NJ 08057

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OF COUNSEL:

ANNE MANFREDI, PRESIDENT
REALTYCOM PARTNERS, LLC
34 BOTHIN ROAD
FAIRFAX, CA 94930

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SUMMARY

RealtyCom Partners on behalf of itself ("RCP")[1], certain clients[2], and other MDU owners, including the California Apartment Association (CAA), the largest statewide rental housing trade association in the country representing more than 795,000 units throughout the State of California[3], and other MDU representatives[4] strongly opposes any future rulemaking that would disturb the practice of exclusive marketing and Bulk service agreements between multichannel video programming distributors ("MVPD") and multiple dwelling unit ("MDU") property owners and other real estate developments. RCP will leave the legal issues on whether the FCC even has the regulatory authority to

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[1] **RealtyCom Partners**, LLC is a real estate and telecommunications consulting firm that represents real estate property owners, property management companies and developers for both multifamily and single family residential developments. RCP's services include portfolio management, infrastructure analysis, market analysis, service provider contract negotiation, and regulatory issues with respect to all telecommunication and broadband services for voice, video, high-speed Internet and wireless communications. Don A. Clark has over 28 years experience as a senior executive on the service provider side and as a consultant for the real estate industry. RCP was formed specifically to address the evolving telecommunications and broadband marketplace and the new competitive environment between the cable operators and the ILECs and the ensuing impact on real estate residential property owners. Anne Manfredi has an extensive background in the real estate industry and was one of the principals of a very successful private cable operator. RCP currently represents many real estate clients and has been active in the industry for over 20 years. RCP, therefore has a unique perspective to address these important issues and understands the issues for all the parties.

[2] Jeff Stack / **Sares Regis Group**; John Pringle / **E&S Ring**; Doug Bisset, **JP Morgan Asset Management**; **Shea Properties**; **Sequoia Equities; Acacia Capital; Ambach Communities; Thompson / Dorfman; Prometheus Real Estate Group;**

[3] **The California Apartment Association** (CAA) supports RCP's position and argument opposing the any regulatory action by the FCC prohibiting exclusive marketing agreements or bulk billing agreements. **Lane Company**

[4] Steve Lefkovits, **Joshua Tree Consulting** represents multi-family property owners and supports and concurs with RCP's comments; Robert A. Coco, President of **Choice Property Resources**, Inc. (Choice) concurs with RealtyCom Partners and their positions and supporting statements that oppose the FCC's efforts to ban exclusive marketing contracts and bulk billing contracts for multichannel video providers. Choice is a full service multi-family consulting firm, specializing in representing multi-family owners, developers and managers. Choice currently represents over 132,000 units, in 35 states, on 1117 properties. Choice has 48 clients.

prohibit such practices and whether these arrangements constitute an unfair method of competition or an unfair act or practice in violation of Section 628(b) of the Act to the Real Access Alliance, which position and argument RCP hereby supports and adopts. RCP will instead focus on the issues and questions the FCC has raised with respect to these agreements and their effect on the competitive environment which the FCC seeks to promote. In particular, we will focus on whether the FCC should treat these agreements in the same manner as exclusive access arrangements, even though RCP does not necessarily concur with those findings. We will examine whether the harms, if any, outweigh the benefits of such exclusive agreements to residents and address the arguments that the FCC cited in its Report and Order[5] to justify its action in adopting a prohibition on exclusive access agreements, and by which it has said it will judge the merits of whether it should take any further action by prohibiting exclusive marketing and Bulk agreements. RCP will also address the definition of MDU by the FCC to attempt to clarify what "other centrally managed real estate developments" are and which developments do not, under the FCC Report and Order, fall under the MDU definition.

There is absolutely no evidence to indicate at this time that exclusive marketing agreements "block out" a MVPD from communicating and providing

[5] FCC Report and Order and Proposed Future Rulemaking - MB Docket No. 07-51

their offering, not only their video satellite programming, but also their entire triple play service to consumers in MDUs. Quite the contrary, the availability of these marketing agreements give a competitor to an incumbent provider an opportunity to secure target marketing tactics to help gain market share[6]. In addition, as Congress recognized, Bulk agreements play, although a small role, an important role in providing consumers with significant discounted service.

The FCC ruling on exclusive access could achieve some of the desired goal in opening up competitive access to the ILECS that will give them the opportunity to provide residents a choice in MVPD service providers. RCP believes that the FCC, after reviewing the record, will see no need, or reason to pursue any additional regulatory action to promote competition, but will determine it is in the best interest to all parties, service providers, property owners and consumers to allow the competitive marketplace to work without regulatory action. The step to prohibit exclusive access agreements, if upheld, is a significant action by the FCC that will have an impact on the market and it would be premature at best to take any further action until a further record is established on the intended results it will have.

[6] In 2007 RCP represented several MDU portfolios in the western states with approximately 250 individual properties in 6 states, including California, Oregon and Washington where Verizon and AT&T had launched their new FIOS and Uverse services, including video. In all markets where they had service, the ILECs responded to all RFPs seeking exclusive marketing arrangements.

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COMMENTS OF REALTYCOM PARTNERS

INTRODUCTION

RealtyCom Partners, LLC ("RCP")[7] and certain clients[8], and other MDU owners, including the California Apartment Association (CAA), the largest statewide rental housing trade association in the country representing more than 795,000 units throughout the State of California[9], and other MDU representatives[10] respectfully submits these Comments in response to the

[7] RealtyCom Partners, LLC is a real estate and telecommunications consulting firm that represents real estate property owners, property management companies and developers for both multifamily and single family residential properties. RCP, therefore has a unique perspective to address these important issues and understands the issues for all the parties.

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[9] **The California Apartment Association** (CAA) supports RCP's position and argument opposing the any regulatory action by the FCC prohibiting exclusive marketing agreements or bulk billing agreements; **Lane Company**

[10] Steve Lefkovits, **Joshua Tree Consulting** represents multi-family property owners and supports and concurs with RCP's comments; Robert A. Coco, President of **Choice Property Resources**, Inc. (Choice) concurs with RealtyCom Partners and their positions and supporting statements that oppose the FCC's efforts to ban exclusive marketing contracts and bulk billing contracts for multichannel video providers. Choice is a full service multi-family consulting firm, specializing in representing multi-family owners, developers and managers. Choice currently represents over 132,000 units, in 35 states, on 1117 properties. Choice has 48 clients.

Commission's Notice of Proposed Rule Making ("NPRM"). The NPRM solicits comment on whether the Commission should prohibit exclusive marketing and bulk billing arrangements.

There is absolutely no evidence to indicate at this time that exclusive marketing agreements "block out" a MVPD from communicating and providing their offering, not only their video satellite programming, but also their entire triple play service to consumers in MDUs. Quite the contrary, the availability of these marketing agreements give a competitor to an incumbent provider an opportunity to secure target marketing tactics to help gain market share[11]. In addition, as Congress recognized, Bulk agreements play, although a small role, an important role in providing consumers with significant discounted service.[12]

Exclusive marketing agreements do not create any harm to consumers, especially when used in current market conditions by either the incumbent MSOs or the ILECS, and are not a barrier to new entry into the multichannel video marketplace, the provision of triple play offering, the effective

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[11] In 2007 RCP represented several MDU portfolios in the western states with approximately 250 individual properties in 6 states, including California where Verizon and AT&T had launched their new FIOS and Uverse services, including video. In all markets where they had service, the ILECs responded to all RFPs for exclusive marketing arrangements.

[12] 47 C.F.R. §76.984; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, MM Docket 92-266, 8 FCC Rcd 5631, ¶¶421-425 (1993).

communication to consumers of available service options, or the deployment of broadband technology.

RCP believes that the pervasiveness of bulk billing agreements that is resulting in anticompetitive practices is severely overblown which would justify a remedial action by a federal agency. In addition, the FCC has not demonstrated any evidence to justify that these agreements present a significant deterrent to a competitive MVPD that denies or prevents the provision of video service. In fact, many consumers under bulk contracts subscribe to services offered by other MVPDs that are not offered by their bulk service provider on a particular property.

It is evident that there are niche markets where bulk billing agreements are a tremendous financial benefit to consumers who are on fixed incomes or low income segments of the population and that such action by the FCC would be paramount to a severe tax and hardship on these consumers.

The Commission needs to obtain a much more thorough understanding of bulk contracts before embarking on any type of regulation, let alone prohibiting such contracts. These types of agreements are also found in certain markets like Florida and California and entered into with condominiums homeowner associations (HOA). Many of these HOAs would prefer these types of discounts for their residents then to seek more than one MVPD providers and pay retail rates. These states like others have statues that govern these agreements and afford the associations remedies if these service providers fail to provide adequate service, or they limit the term any such agreements can be executed with the builder or developer.[13] Such issues are better addressed by States and local governments, as opposed to the Commission, and any action by the Commission may inadvertently preempt such State and local laws.

[13] See Section 718.115, Florida Statutes.

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FCC Questions and request for comment – RCP will address exclusive marketing separately from bulk billing agreements, since they are distinctly different in their application to the consumer and to competition.

1. **How pervasive are these exclusive marketing arrangements? What is the typical scope of such arrangements?**

There is really no specific data on this question, however, marketing provisions are in most existing MDU agreements and in some cases with exclusivity language that grants the provider a "preferred" status that allows them to market their service(s) exclusively in the common areas of the property, such as the leasing office, clubhouse, and fitness center to the degree these facilities exist for each property. In most cases today leasing offices simply put marketing collateral material in the resident package and rarely directly "sell" the providers services. Most MDU owners do not agree to this due to their leasing personnel's heavy workload and training requirements. It is up to the resident to call the provider to order services. In some cases, if available, they can go on the MDU web portal (small percent) to link to the provider to order services.

2. **Have they been used to impede competition in the video marketplace? Can other MVPDs effectively communicate with MDU residents in those MDUs that have signed exclusive marketing agreements?**

No, there is no evidence that exclusive marketing agreements impede competition. The particular "targeted" marketing tactics discussed above do not block, or obstruct a competitor from communicating, marketing and providing their services to residents and represent only a few of the marketing tactics available to both MSOs and ILECS. In the case of ILECs, they already in most cases are the service provider of voice or DSL services to residents, which they communicate with as subscribers on a monthly basis through billing inserts and direct mail. Other forms of mass marketing, print, broadcast, billboard and online advertising are also prevalent in the marketplace, which clearly describes the services and promotions available. It would be beyond any reasonable determination to think that MDU residents would not be aware of their service options.

It is true that these "preferred" marketing arrangements do provide a competitive advantage and do present a value to all the MVPDs. Without exception, in competitive markets all the ILECs and MSOs seek to acquire these exclusive marketing arrangements with MDUs.

These marketing arrangements are actually a benefit to competition and are extremely valuable to a MSO competitor, like Verizon and AT&T trying to gain video market share. Additionally, there has not been one MDU property that RCP represents that Verizon, or AT&T, or the MSOs have refused to provide service based upon the fact they could not acquire exclusive marketing arrangements.[15]

These marketing agreements are not unlike many other service or product industries where exclusive advertising, marketing, and product placement agreements are commonplace and entered into with private property owners, such as airports, restaurants, office buildings, hotels, recreation facilities and others. MDU property owners should be treated no different than commercial building owners where the FCC prohibits exclusive access, but does not prohibit exclusive marketing arrangements.[16]

3. Do the costs of marketing, promotions and sales substantially increase when a competitive video provider confronts exclusive marketing arrangements?

No, it is actually just the opposite case. In a market where an ILEC, or MSO has service available, there is a specific cost of a marketing and advertising plan which is directed at all existing or potential subscribers in a market, whether broadcast, print, direct mail, online, billboards etc. With a MDU, the provider with the "preferred, or exclusive" marketing rights, actually is investing targeted marketing dollars as part of that plan to obtain the marketing rights and target the residents with specific marketing

[15] Verizon has a clear policy that they will install FIOs with just a License agreement, without a marketing agreement. Arbors at California Oaks in Murrieta, CA is an example of this practice. AT&T has taken the same position, although both aggressively seek marketing agreements.

[16] The Competitive Networks Order prohibits telecommunications carriers from exclusive access, but does not prohibit exclusive marketing agreements

messaging and expects a better return on that investment in the form of greater marker share in subscribers and level of services in the MDU. In the case of an ILEC as the competitor attempting to gain market share over an incumbent MSO, obtaining the "preferred, or exclusive" marketing rights has a better potential to produce a good return on investment through subscriber acquisition.

A new entry to any market typically has to spend marketing dollars to gain market share and the incumbent spends marketing dollars to retain their market share position. It amounts to how each competitive company decides to allocate their overall marketing budget. There is nothing new here, and to suggest that these marketing agreements are driving the cost up just isn't supported by any evidence, particularly in this case when the new entry already is in the market with existing subscribers.

4. Do these arrangements constitute an unfair method of competition or an unfair act or practice in violation of Section 628(b) of the Act?

No, 628(b) states "Section 628(b) prohibits cable operators from engaging in unfair practices that have the purpose or effect of hindering significantly or preventing their competitors from providing satellite cable programming or satellite broadcast programming to subscribers or consumers" There is nothing in exclusive marketing agreements that has the effect, according to the FCC argument on exclusive access agreements, which locks-up, blocks, obstructs, or prevents competitors from providing satellite programming. The competitive nature of exclusive marketing agreements is framed around competition for the consumer, not preventing the provision of service to the consumer. Consumers are not denied a choice if there are more than on MVPD on a property even if there exist marketing agreements. The FCC's finding in the Report and Order, supports the concept of the service providers contesting one another through marketing activities, which says "we find that the best results for consumers come from preserving their ability to play an active role in making an individual choice."[17]

Clearly, exclusive marketing agreements do not represent unfair competitive practices, do not foreclose individual choice, and are fairly given the opportunity to both the ILECs, as well as, the MSOs to enter into agreements with the MDU owner. There is absolutely no problem that exist today with exclusive marketing arrangements, or a need for the FCC to address this issue, and to do so would be for the federal government and the FCC to try to micro-manage the service provider competitive marketplace, which likely would result in a disruptive, confusing situation within the

[17] FCC Report and Order and Proposed Future Rulemaking - MB Docket No. 07-51
Section 28 of the Order

MDU industry, as well as, deterring the FCC goal of broadband technology deployment and new entry MVPD competition.

5. **Should we treat them (exclusive marketing) in the same manner as we treat exclusive access arrangements in the item we adopt today?**
   No, these two issues are very different and RCP will compare the FCC argument for prohibiting exclusive access agreements against the case for treating marketing agreements the same based upon the harms and benefits justification of such action.

   a. FCC states , **"By far the greatest harm that marketing exclusivity cause residents of MDUs is that they deny those residents another choice of MVPD service and thus deny them the benefits of increased competition"**

   There is clear evidence that exclusive marketing agreements do not deny residents their choice of MVPD service and therefore do not deny the benefits of competition.[18]

   AT&T has been very active throughout their market for many years in offering their Smart Moves program and that provides exclusive marketing rights to AT&T for voice and DSL service. Verizon has many of these agreements as well, which both seek today to renew and

[18] In all the markets that Verizon and AT&T have entered as a MVPD whether through satellite DBS, or their wire line service, it is clear from their own analyst reports and market data in recent deals with MDU owners and groups representing several large REITS that they have not been denied entry and particularly as a result of any impact of marketing agreements.

add video. In spite of these ILEC agreements, MSOs have not denied service to these properties. As stated earlier, both Verizon and AT&T have indicated to RCP clients that they do not require an exclusive marketing agreement as a condition to provide service, although they offer incentives as do MSOs for those marketing rights.

In markets where there is MVPD ILEC competition, which today still remain few, ILECs are actively seeking access to install the Verizon's FIOS network and AT&T's Uverse service, although in most cases the FIOS video and IPTV service is not available as yet, in which case, they may offer their DBS platform. All of the 250 individual properties our MDU clients put out in 2007 for a RFP from service providers, ILECS were included. The ILECS have actively bid on the properties in their markets and there has not been any reluctance from property owners to considering granting them exclusive marketing rights. In fact, there are cases today where the MSO may have an exclusive marketing agreement for certain services, as well as, the ILEC that has exclusive marketing agreement for other services.[19] If an ILEC were denied an exclusive marketing agreement for video, it was due more to their negotiating strategy and inability to offer a

[19] RCP clients have several of these situations and one FIOS property has an exclusive marketing agreement for 2 services and the MSO for one.

suitable video option, or precisely when one would be available. In time this will change if the ILECs continue their planned rollout of video services and video competition will become increasingly available to residents.

b. FCC states, "A significant increase in multichannel competition usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources." Specifically, a wired-based ILEC competitor.

It is true that in any industry competition is healthy and usually results in benefits to the consumer. This certainly applies to MVPD providers. We have seen this occur particularly in single family markets where Verizon or AT&T have launched their video service to communities and offered discounted "triple play" packages similar to the MSO incumbent. In MDUs where both the ILEC and the MSO are serving, we see the same type of discounting and promotional packages.

Preferred or Exclusive marketing agreements in and of themselves do not deny the consumers of pricing discounts even in cases where there is no other MVPD serving the properties, as these discounts are made available to all residential consumers in the market, whether they live in a single family or multifamily residential unit.

With respect to the MDU residents having a choice of different channels, information and entertainment services from more than one source, obviously there must be more than one MVPD available to the MDU residents. Again, as demonstrated in the market, Marketing agreements do not deny the entry of service or provision of these benefits. These marketing agreements, even if entered into prior to the entry of ILEC MVPD competition will not deny the residents these competitive benefits. In addition, MDU property owners are typically aware of the conditions in their markets and are not likely to preclude the consideration of the ILECs in discussing service to their properties since many of them have existing service agreements or relations with them today. Therefore, the FCC argument made about exclusive access agreements that they deny benefits to consumers definitely does not apply to exclusive marketing agreements. In fact the FCC agrees with this conclusion in its Report and Order, in it rejecting the argument the exclusive access agreements mostly work to benefit the MDU owner and residents, states "Finally**, other agreements**

between incumbent MVPDs and MDU owners, perhaps providing for marketing exclusivity or bulk discounts, can provide benefits similar to those alleged for exclusivity clauses (access) without causing the latter clauses' entry-foreclosing harms to consumers."[20]

c. **FCC states, "Increased deployment of fiber to American homes at lower cost per residence and a new competitor offering the "triple play" bundle of video, voice, and Internet access service. An marketing exclusivity in a MDU's agreement with a MVPD denies all these benefits to the MDU's resident"**

The undeniable public evidence in the marketplace is that both AT&T and Verizon are currently investing billions of dollars in new infrastructure deployment capable of delivering video and greater broadband capacity and are growing in subscribers[21]. Unlike the FCC contention that exclusive video access or service agreements may deny

[20] FCC Report and Order and Proposed Future Rulemaking - MB Docket No. 07-51 in Sec. 28

[21] Verizon 4th quarter highlights-press release -1-28-2008; broadband fiber-to-the-premises network, which delivers FiOS Internet and FiOS TV services to customers, passed more than 9.3 million premises by year-end. FiOS Internet was available for sale to 7.5 million premises in parts of 17 states by year-end. FiOS TV was available for sale to 5.9 million premises in parts of 13 states by year-end. Verizon added a net of 226,000 new FiOS TV customers. The company had 943,000 FiOS TV customers by year-end and announced today that it had added its 1 millionth FiOS TV, and added a net of 245,000 FiOS Internet connections this quarter, for a total of more than 1.5 million as of year-end; AT&T 4th quarter report -1-24-2008- Pre-holiday install rate of approximately 12,000 a week, ramping to 40,000 by the end of 2008 and targeting more than 1 million in service by the end of 2008

the ILEC of offering their video service in an MDU, exclusive marketing agreements do not deny the provision and benefits of this new technology deployment. In fact, as stated earlier in this document the evidence is quite clear that the existence of exclusive marketing agreements, or the prospect of one, does not disqualify a MDU property and their residents from Verizon or AT&T introducing this technology and advanced broadband services in a triple play package thereby maximizing the efficiency and return of investment of this deployment.

d. **A MDU owner may grant marketing exclusivity to one MVPD based on the available choice of service providers at a given time, and in doing so bar entry into the MDU by a more desirable but later-arriving MVPD.**

The issue here for MDU owners is that they must deal with the reality in the marketplace at any certain time in the market in which their various properties reside. The bottom line for the owner is to try to provide the best voice, video and high-speed Internet service provider services to their residents. In the past, typically there was only one provider available for each service and it wasn't financially viable for MVPDs to overbuild an incumbent provider. In addition, MDU properties have had less than adequate programming service and customer service in the past compared to single family homes with less choice and used exclusive access agreements to negotiate programming, customer service and technology upgrades. Their alternative video choice to the MSOs up until today has been the Private Cable Operator (PCO), which for the most part has done a reasonably good job in offering customized programming and a focus on customer service.

Now the phone companies have said they will bring a new video option to consumers. Although there is every indication that they will follow through with this commitment, this promise has been made in the past and attempted using various forms of technology which wasn't realized. AT&T is relying on an IPTV technology that according to many experts has not been fully refined and in fact Qwest has indicated they do not plan to deploy it due to the significant expense. Verizon on the other hand is doing an entire fiber optic rebuild of their network, which is extremely expensive and time consuming. It is not reasonable to ask a MDU owner to wait for a indeterminate time for a service that may never be available to their property, when they have an opportunity to improve the programming, service and technology when no current agreement exist, or is up for renewal with the incumbent. This is particularly true with new build developers and builders who must negotiate with the MVPDs that are an option to them at the time they plan to build their development and attempt to maximize the benefits to them and to their residents.

Again, unlike the FCC argument that exclusive access agreements for video service, entering into an exclusive or preferred marketing agreement with a service provider in a new build or in an existing property, does not preclude them from introducing a new MVPD provider at some point in the future.

e. Benefits of Exclusive Marketing agreements

As stated by the FCC, exclusive marketing agreements "can provide benefits similar to those alleged for exclusivity clauses" (access). The most important objective for most MDU owners as the telecommunications market grows more competitive with the entry of the ILECS is to maintain control of their properties in terms of infrastructure, access, and leverage in negotiations of contract terms with service providers for the benefit of the owner and their residents.

Even though exclusive access agreements provide many of these benefits, the FCC allows that many of the same benefits can be achieved with other exclusive agreements such as exclusive marketing. In order for this to be possible, the FCC must not interfere or prohibit the MDU owners the ability to negotiate these agreements with competing service providers. Exclusive marketing agreements give the MDU owner a valuable right that they can grant in return to a service provider for commitments on programming, services, quality customer service, technology, maintenance, complimentary common area services, Wi-Fi access for residents, important legal provisions that protect the owner and allow remedies for failures to perform, as well as, ancillary revenue for cost allocation. In addition, these agreements are incentives for service providers to invest in providing deployment of technology and advanced services in more properties other than the attractive high-unit, high-end properties. Without the ability to offer certain incentives to service providers to enter a property and invest in those properties, it is less likely that these benefits can be realized for the owner and their residents.

f. Conclusion on Exclusive Marketing Agreements

RCP concludes by using the same criteria the FCC judged exclusive access agreements, that the benefits of exclusive marketing agreements far outweigh any reason for the FCC to take any action to prohibit these agreements. The evidence described in the preceding paragraphs demonstrates that exclusive marketing agreements do not create any harm to consumers, especially when used in current market conditions by either the incumbent MSOs or the ILECS, and are not a barrier to new entry into the multichannel video marketplace, the provision of triple play offering, the effective communication to consumers of available service options, or the deployment of broadband technology. In fact, the opposite conclusion could be drawn that by the FCC taking action to prohibit exclusive marketing agreements the harm will far outweigh the benefits. It is clear that the FCC should take a "cautious approach" and allow the market to work or the result could be Justice Holmes' observation that "if regulation goes too far it will be recognized as a taking".

6. **Should we treat them (bulk billing agreements) in the same manner as we treat exclusive access arrangements in the item we adopt today?**

No, bulk agreements have been recognized by Congress to have a special role in MDU properties and serve as a significant benefit to consumers, many that are minorities, seniors or lower income consumers.

Bulk agreements are a very small percent of the MDU MVPD agreements in the market and are typically offered, in addition to the residents in lower income properties, to properties where the MDU owner negotiates a bulk discount on a limited basic video service and includes it in the rent of the residents as a competitive amenity to attract residents. This can be a very attractive amenity to many consumers.

These bulk rates can be discounted as much as 50% or more and remain over a period of time for the benefit of the residents in those properties. Many of these properties are candidates for these types of agreements due to a high turnover rate of residents and a low video penetration of subscribers for the service provider. These properties would never be attractive for an entry of a second MVPD.

These types of agreements are also found in certain markets like Florida and California and entered into with condominiums homeowner associations (HOA). These states like others have statues that govern these agreements and afford the associations remedies if these service providers fail to provide adequate service, or they limit the term any such agreements can be executed with the builder or developer.[22] Many of these HOAs would prefer these types of discounts for their residents than to seek more than one MVPD providers and pay retail rates. RCP believes these HOA agreements should be left to the states to regulate and the HOAs themselves. To prohibit them would be to take away significant benefits to the consumers that have elected to enter into them, or retain them for their home owners.

Even in higher-end MDUs where the video basic channel is included in the rent, residents can individually subscribe to additional video services, high-speed Internet or voice from the incumbent provider or a competitor service provider. Prospective MDU apartment residents all have the choice and option when they consider moving into an apartment whether they will be satisfied with the bulk amenity. Since most leases are 6 months to a year, if a resident doesn't like the arrangement, they can move out. The risk of bulk services and cost in MDUs are the risk of the owner and therefore they are offered by a very small portion of the general MDU market.[23] They do not interfere with competition or warrant the FCC to attempt to regulate such diverse agreements that appear to benefit much more than harm residents.

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[22] See Section 718.115, Florida Statutes.

[23] From the 250 properties that RCP clients put out a RFP in 2007, in which we asked for any bulk proposals, there were 2 properties that we received proposals on and they were existing bulk agreements that were being renewed.

a. Conclusion on bulk billing agreements

RCP believes that the pervasiveness of these types of bulk billing agreements is severely overblown that would justify a remedial action by a federal agency. In addition, the FCC has not demonstrated any evidence to the contrary to justify that there is a significant deterrent to a competitive MVPD that denies or prevents the provision of video service by these agreements. In fact, it is undeniable the ILECs have the same opportunity as the MSOs to enter into bulk billing arrangements and have done so.

It is also a fact that the existence of these types of agreements has not had any impact on the deployment of broadband technology by either the ILECs or MSOs and the benefits that this deployment offers consumers. Quite the contrary, these agreements often are the incentive for a service provider to bring their technology in and offer advanced services, particularly in new build MDU developments.

It is also evident that there are niche markets where these types of agreements are a tremendous financial benefit to consumers who are on fixed incomes or low income segments of the population that such action by the FCC would be paramount to a severe tax and hardship. I assume this is not what result the FCC is seeking. How is the FCC going to decide what type of MDU property and what demographic makeup a property has to have to be exempt from such regulation? Is the FCC going to establish a standard and try to enforce the qualifications? What happens to seniors and minorities who can no longer afford to live in an apartment or condo and is forced to move or sell their home because of indiscriminate application of the federal government trying to regulate the free marketplace? Would any action by the FCC supersede any existing regulations at the state level? The FCC should allow states to regulate their own set of circumstances as it relates to the issue of bulk billing, which many have already done.

Cable Act was amended for the express purpose of allowing cable operators to compete by offering bulk agreements to MDUs. The Cable Communications Policy Act of 1984[24] of recognizing and supporting bulk discounts for MDUs as an exception to the uniform rate requirement. In implementing the 92 Act, the Commission recognized that providers can realize cost efficiencies by serving MDUs and did not wish to foreclose the prospect that such savings would be passed on to consumers. The Commission determined that cable operators may offer different bulk rates to MDUs of different sizes and may vary bulk rates based on the duration of the contract. The FCC should again take a very "cautious approach" to taking any action on bulk agreements as it is clear there would likely be much more

[24] Public Law 98-549.

unintended harm to consumers than benefits and would not further the goal of fostering competition.

7. The **definition of MDU for the purpose of this proposed rulemaking on exclusive marketing agreements and bulk billing agreements.**

FCC state in the Report and Order, "MDUs include apartment, cooperative, and condominium buildings. For purposes of this *Report and Order,* we adopt this definition but expand it to include other centrally managed real estate developments. Thus, the term MDUs, for purposes of this *Report and Order*, also includes gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. All of these are collections of private individual households with residents remaining for lengthy, indefinite periods of time, each in a dwelling space that is distinctly separate but shares some common spaces requiring central management. [25]

RCP would like to address and comment on the vagueness of the term "other centrally managed residential real estate developments" in the definition of MDU.

[25] FCC Report and Order and Proposed Future Rulemaking - MB Docket No. 07-51
Section 7 of the Order

a. First, it is clear by the reference to this market by the FCC making up 30% of the residential housing, and that 70% of the residential housing is not subject to the current rule adopted, or the future proposed rule making.
b. It is also seems clear from the FCC Report and Order that, perhaps with the exception of gated communities, the FCC does not include single family residential developments that are subject to public access right aways.[26]
c. As the FCC knows there are real estate developments that are managed by a developer that in turn sells lots to single family home builders. There are 100s of developments that have been built that include clubhouses and fitness centers, etc. that must be centrally managed. Service providers in some cases have entered into telecommunications non-exclusive access and preferred marketing agreements with developers and builders to be able to showcase their services as a community is built out.
d. These marketing agreements are attractive to developers that are able to receive commitments as to services, technology, common area services, cost allocation for structured wiring, and the assurance that the development will have a similar service and technology available to not

[26] FCC Report and Order and Proposed Future Rulemaking - MB Docket No. 07-51 Sec. 33 --Public access right aways are not subject to this and does not apply to this order or future rulemaking referenced hereto

only their builders, but to their prospective home buyers throughout the development.

e. Obviously these types of developments allow for any MVPD, phone company or utility that is franchised to have access to the public right away in order to install their system and provide their services. In addition, since each home owner controls access to their home, they have the option to subscribe to whatever service they chose, including satellite services such as DirecTV and dish, which currently have a 28% penetration in the single family market. So these types of developments clearly do not deny the provision, communication, or benefits of broadband technology and the triple play offerings in the market today.

f. It would be RCP's understanding that real estate developments with public access right aways, even if there is an HOA that centrally manages certain maintenance of the common areas, security, garbage and telecommunication services to the common areas, and that developers have marketing agreements, that this type of development would not constitute a MDU under the FCC definition.

g. RCP believes the FCC should make clear that the fact there are some centrally managed aspects to these types of real estate developments, that they do not fall under the definition as intended.

Conclusion

For all the foregoing reasons, the Commission should refrain from addressing the issue to prohibit exclusive marketing agreements and bulk billing arrangements with respect to video services in MDUs.

Respectfully Submitted,

Donald A. Clark, CEO
RealtyCom Partners, LLC
P.O. Box 871
Moorestown, New Jersey, 08057
(609)790-8422

OF COUNSEL:

ANNE MANFREDI, PRESIDENT
REALTYCOM PARTNERS, LLC
34 BOTHIN ROAD
FAIRFAX, CA 94930

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